

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
2 Department of Industrial Relations  
3 State of California  
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8 Attorney for the Labor Commissioner

9  
10 BEFORE THE LABOR COMMISSIONER  
11  
12 OF THE STATE OF CALIFORNIA  
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VICTORIA STROUSE, an individual	)	Case No. TAC 13-00
	)	
Petitioner,	)	
	)	
vs.	)	DETERMINATION OF
	)	CONTROVERSY
	)	
	)	
CORNER OF THE SKY, INC., a California	)	
corporation, d/b/a CORNER OF THE SKY	)	
ENTERTAINMENT, INC.,	)	
	)	
Respondents.	)	
	)	
	)	

17 INTRODUCTION

18 The above-captioned petition was filed on May 15, 2000,  
19 by VICTORIA STROUSE, (hereinafter "Petitioner" or Strouse),  
20 alleging that CORNER OF THE SKY, INC., dba CORNER OF THE SKY  
21 ENTERTAINMENT INC., (hereinafter "Respondent"), acted as an  
22 unlicensed talent agent in violation of Labor Code §1700.5<sup>1</sup>. The  
23 petitioner seeks a determination voiding *ab initio* the 1996 oral  
24 and subsequent written management agreement between the parties.

25 Respondent filed his answer on June 19, 2000. A hearing  
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27 <sup>1</sup> All statutory citations will refer to the California Labor Code unless  
28 otherwise specified.

1 was scheduled and commenced in the Los Angeles office of the Labor  
2 Commissioner on October 6, 2000. Petitioner was represented by  
3 Matthew H. Schwartz of Green & Schwartz, LLP; respondent appeared  
4 through his attorney Jay M. Spillane of Fox & Spillane LLP. Due  
5 consideration having been given to the testimony, documentary  
6 evidence, briefs and arguments presented, the Labor Commissioner  
7 adopts the following determination of controversy.

8  
9 FINDINGS OF FACT

10 1. Respondent, once a literary talent agent for the  
11 William Morris Agency, opted for a career change and in 1996 became  
12 a literary manager. In October of 1996, the parties entered into  
13 an oral contract whereby respondent would manage petitioner's  
14 career as a motion picture screenwriter. According to the  
15 respondent, managing petitioner's career included, *inter alia*,  
16 reviewing her work, advising her as to which works were marketable,  
17 utilizing his "connections" to obtain a licensed talent agent and  
18 "shopping" her screenplays for the ultimate goal of selling  
19 petitioner's product.

20 2. During 1997, respondent focused on selling two  
21 completed screenplays, titled "Chick Flick" eventually renamed  
22 "Just Like a Woman" and "Mary Jane's Last Dance". In an effort to  
23 sell the screenplays, respondent admittedly, "sent the transcript  
24 ['Chick Flick'] to everyone [he] knew." Included in those  
25 submissions were various producers from Disney, Touchstone  
26 Pictures, New Line Cinema, and Fox Studios. Respondent conducted  
27 these activities ostensibly in the same manner as he did while  
28 working as a literary agent for the William Morris Agency.

1           3.       Respondent testified in great length about the  
2 motion picture industry's two-tiered screenplay purchasing process.  
3 He stated that in his experience, if a producer showed interest in  
4 a shopped screenplay, the producer would then ask a studio to  
5 option or purchase the script. Accordingly, it was the studio who  
6 made the final purchasing decision. Occasionally, respondent would  
7 send petitioner's screenplays directly to a studio if requested to  
8 do so by a producer. The focus of respondent's argument was that  
9 if a producer had shown interest and a studio optioned the  
10 screenplay, it was his intent to bring in a licensed talent agent  
11 to negotiate the terms of the deal. Neither of these prerequisites  
12 occurred with petitioner's work throughout 1997.

13           4.       On March 4, 1998, the parties memorialized the prior  
14 verbal agreement in a writing, purporting to back date the written  
15 agreement from October 15, 1996, through October 14, 1998. In  
16 early 1998, respondent secured a literary talent agent from the  
17 William Morris Agency to represent and assist the petitioner in  
18 selling her screenplays. In April of 1998, respondent went back to  
19 his former occupation as a literary talent agent for Innovative  
20 Artists.

21           5.       In May of 1998, petitioner's new talent agent sold  
22 "Mary Jane's Last Dance" and in early 1999 "Just Like a Woman" was  
23 similarly optioned. Respondent was not involved in the negotiation  
24 of either project and consequently the petitioner failed to pay  
25 respondent's commissions allegedly owed for both projects.  
26 Respondent then filed a breach of contract lawsuit, case no.  
27 BC217761 in Los Angeles Superior Court. The superior court action  
28 was stayed pending the results of this petition.

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2. Labor Code §1700.4(b) includes "writers" of motion pictures in the definition of "artist" and petitioner is therefore an "artist" within the meaning of §1700.4(b).

3. Respondent's argument is twofold. First, respondent argues sending screenplays to producers or sending screenplays directly to studios, does not constitute "**attempting** to procure employment". Respondent reasons that, "the term 'attempt' should be construed as action taken with the intent to negotiate, or resulting in actual negotiation." Respondent maintains that he always intended to bring in a licensed talent agent to negotiate the terms if negotiations ensued, and that sending screenplays to potential producers and/or buyers (studios) was a "courtesy to and [only] at the request of producers<sup>2</sup>." Respondent's analysis is

2 A great deal of testimony was offered to suggest that the two-tiered purchasing system is standard in the industry and that by respondent sending transcripts primarily to producers and not studios, this negated any intent to deal with actual prospective buyers. As a result respondent was not actually attempting to sell the product. Respondent's argument that this is not "attempting to procure" is nonsensical. Respondent intended to seek a buyer in the only way the system allowed; producer first and studio second. A hierarchy of purchasing is insignificant in determining respondent's intent and does not shield the respondent from the literal definition of "attempt", "the act or an instance of attempting; an unsuccessful effort" Merriam Webster 10<sup>th</sup> Edition

1 flawed. To accept Respondent's interpretation of "attempt to  
2 procure" would require the Labor Commissioner to be a mind reader  
3 or own a crystal ball. As here, if there was no actual deal, nor  
4 evidence of past conduct, it is impossible for the Labor  
5 Commissioner to determine whether the respondent would bring in a  
6 licensed talent agent to negotiate the terms of the deal. Even  
7 assuming that he did, this would not exempt the respondent from  
8 requiring a license<sup>3</sup>. To hold that a manager may solicit for the  
9 purchase of a screenplay and then subsequently hire a licensed  
10 talent agent to negotiate the terms of the deal would essentially  
11 amend 1700.44(d). That is solely for the legislature.

12 4. Second, and far more interesting, is respondent's  
13 argument that attempting to sell a completed screenplay would not  
14 constitute an "attempt to procure **employment**" within the meaning of  
15 1700.4(a). Respondent reasons that selling a completed screenplay  
16 is essentially selling services that have already been rendered and  
17 therefore "does not involve employment", as any reasonable  
18 interpretation of employment manifests an intent of the employer to  
19 seek future services.

20 5. In support of respondent's proposition, he cites  
21 Davenport v. AFH Talent Agency, TAC 43-94. In Davenport, the  
22 petitioner was a writer of a novel which the respondent sold to a  
23 book publisher<sup>4</sup>. Our case is markedly different. Here, petitioner

24 <sup>3</sup> Labor Code §1700.44(d) states, "it is not unlawful for a person or  
25 corporation which is not licensed pursuant to this chapter to act in conjunction  
26 with and at the request of a licensed talent agency in the negotiation of an  
employment contract." The statute requires the manager to act at the request  
of a licensed talent agent, not the inverse.

27 <sup>4</sup> In Davenport, the hearing officer held that, "obviously, the activities  
28 of procuring or offering to procure employment in the entertainment industry is  
what requires a license. A literary agent is a person who represents authors in

1 is distinguished in that she is a writer of motion picture  
2 screenplays. Labor Code §1700.4(b) defines "artists" as:

3  
4 actors and actresses rendering services on the legitimate  
5 stage and in the production of motion pictures, . . . ,  
6 writers, cinematographers, . . . , and other artists  
rendering professional services in the motion picture,  
theatrical, radio, television and other entertainment  
enterprises."

7  
8 6. The petitioner in Davenport was not rendering  
9 services in the production of motion pictures or television and  
10 consequently the respondent was not representing an "artist" within  
11 the meaning of 1700.4(b). Here, Strouse writes screenplays to be  
12 adapted for motion pictures and clearly is an "artist" within the  
13 meaning of the Talent Agencies Act. In Davenport, the hearing  
14 officer simply did not address the issue of whether the attempt to  
15 sell a completed screenplay qualified as an attempt to procure  
16 employment in the entertainment industry. The analysis in  
17 Davenport is fact specific and its holding is limited to the sale  
18 of a completed novel. The Labor Commissioner has historically held  
19 that the sale of a novel, not intended for television or motion  
20 pictures, does not fall within the purview of the Labor  
21 Commissioner's jurisdiction because the author of a novel is not an  
22 artist within the meaning of 1700.4(b) and consequently, the  
23 holding in Davenport is neither affected, nor particularly  
instructive here.

24 7. Assuming, *arguendo*, the attempted sale of a  
25 completed work without contemplation of future services is not an

26  
27 the sale of their works to publishers ... The respondent simply sold the  
28 Petitioner's book: a finished product." The case was dismissed on jurisdictional  
grounds.

1 attempt to procure employment; the narrower issue becomes whether  
2 the attempted sale of petitioner's completed screenplay would have  
3 included, discussions about or negotiations for petitioner's future  
4 services. If so, the attempted sale of petitioner's screenplay  
5 would be construed an "attempt to procure employment." Petitioner  
6 introduced a declaration, stating, "key points ... that [are]  
7 raised in **every** negotiation for the purchase of a motion picture  
8 screenplay is whether the screen writer who wrote the material to  
9 be purchased by the acquiring party will be employed in the future  
10 to perform either a "rewrite"<sup>5</sup> or a "polish"<sup>6</sup> on this material."  
11 The declaration was timely objected to on hearsay grounds<sup>7</sup>.  
12 However, this declaration buttressed by the parties testimony  
13 established that the purchase of a motion picture screenplay  
14 invariably includes discussions and/or negotiations regarding  
15 "rewrites" or "polishes".

16 8. Additionally, petitioner sold her screenplays and in  
17 both proposals she was contracted to and did render future services  
18 in the form of "rewrites" and/or "polishes." A holding exempting  
19 unsuccessful solicitations for the sale of a screenplay from the  
20 protective mechanisms of the Act, simply because we are unable to  
21 determine whether future services were contemplated would create an  
22 unprotected avenue through the heart of the Talent Agencies Act.

23  
24 <sup>5</sup> "According to the Writer's Guild of America, a 'rewrite' is the writing  
25 of significant changes in plot, story line or interrelationships of characters  
in a screenplay."

26 <sup>6</sup> "According to the Writer's Guild of America, a 'polish' is the writing  
27 of changes to dialogue, narration and/or action, but not including a rewrite."

28 <sup>7</sup> Cal. Code of Regulations §12031 states, "the Labor Commissioner is not  
bound by the rules of evidence or judicial procedure."

1 The likelihood of future services from the artist after the sale of  
2 a screenplay is so overwhelming, that an unsuccessful attempt to  
3 sell a completed screenplay shall be considered an attempt to  
4 procure employment. The Act is a remedial statute ... [and is]  
5 designed to correct abuses that have long been recognized and which  
6 have been the subject of both legislative action and judicial  
7 decision . . . Such statutes are enacted for the protection of  
8 those seeking employment [i.e., the artists]. Consequently, the  
9 Act should be liberally construed to promote the general object  
10 sought to be accomplished. To ensure the personal, professional,  
11 and financial welfare of artists. Waisbren v. Peppercorn, 41  
12 Cal.App.4th 246 at 254. Clearly, the Labor Commissioner cannot  
13 allow literary managers to solicit for sale artists' scripts and  
14 screenplays and allow that activity to be devoid of regulation,  
15 unless the product is sold and future services rendered. This  
16 would create a standard that would be both arbitrary and  
17 unenforceable.

18 9. In short, the shopping, or unsuccessful efforts to  
19 sell, completed screenplays and scripts to producers and studios in  
20 the television and motion picture industries, absent compelling  
21 evidence that no future services of the artist are contemplated,  
22 establishes an attempt to procure employment within the meaning of  
23 1700.4(a) and consequently is protected activity.

24 10. Labor Code section 1700.5 provides that "no person  
25 shall engage in or carry on the occupation of a talent agency  
26 without first procuring a license therefor from the Labor  
27 Commissioner."

28 11. In Waisbren v. Peppercorn Production, Inc. (1995)



1 41 Cal.App.4th 246, the court held that any single act of  
2 procurement efforts subjects the agent to the Talent Agencies Act's  
3 licensing requirements, thereby upholding the Labor Commissioner's  
4 long standing interpretation that a license is required for any  
5 procurement activities, no matter how incidental such activities  
6 are to the agent's business as a whole. Applying Waisbren, it is  
7 clear respondent acted in the capacity of a talent agency within  
8 the meaning of §1700.4(a).

9 12. Waisbren adds, "Since the clear object of the Act is  
10 to prevent improper persons from becoming [talent agents] and to  
11 regulate such activity for the protection of the public, a contract  
12 between an unlicensed [agent] and an artist is void." Waisbren,  
13 supra, 41 Cal.App.4<sup>th</sup> 246 at p. 261; Buchwald v. Superior Court,  
14 254 Cal.App.2d 347 at p. 351.

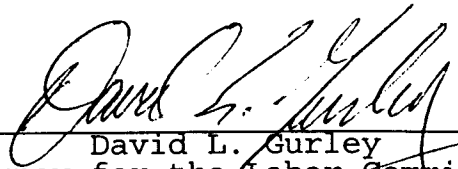
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16 ORDER

17 For the above-stated reasons, IT IS HEREBY ORDERED that  
18 the 1996 oral contract and 1998 subsequent written extension  
19 between petitioner VICTORIA STROUSE, and respondent CORNER OF THE  
20 SKY, INC., dba CORNER OF THE SKY ENTERTAINMENT, INC., is unlawful  
21 and void *ab initio*. Respondent has no enforceable rights under  
22 that contract.

23 Having made no showing that the respondent collected  
24 commissions within the one-year statute of limitations prescribed  
25 by Labor Code §1700.44(c), petitioner is not entitled to a monetary  
26 recovery.  
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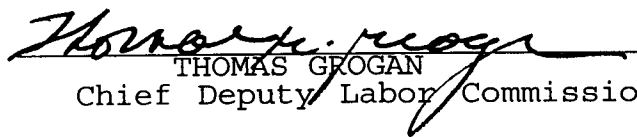
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Dated: 2-28-01

  
\_\_\_\_\_  
David L. Gurley  
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: FEB 27 2001

  
\_\_\_\_\_  
THOMAS GROGAN  
Chief Deputy Labor Commissioner

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

**CERTIFICATION OF SERVICE BY MAIL**  
(C.C.P. §1013a)

**VICTORIA STROUSE, AN INDIVIDUAL VS. CORNER OF THE SKY, INC.  
A CALIFORNIA CORPORATION, DBA CORNER OF THE SKY  
ENTERTAINMENT INC.  
SF 013-00                      TAC 13-00**

I, Benjamin Chang, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9<sup>th</sup> Floor, San Francisco, CA 94102.

On March 1, 2001, I served the following document:

**DETERMINATION OF CONTROVERSY**

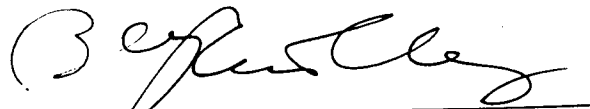
by facsimile and by placing a true copy thereof in envelope(s) addressed as follows:

**MATTHEW H. SCHWARTZ  
GREEN & SCHWARTZ, LLP  
1875 CENTURY PARK EAST, STE 1240  
LOS ANGELES, CA 90067**

**JAY M. SPILLANE  
FOX, SIEGLER & SPILLANE LLP  
1880 CENTURY PARK EAST, STE 1114  
LOS ANGELES, CA 90067**

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first-class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on March 1, 2001, at San Francisco, California.

  
\_\_\_\_\_  
BENJAMIN CHANG

CERTIFICATION OF SERVICE BY MAIL